



BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c.H.19, as amended;

AND IN THE MATTER OF the complaint by Michelle Crane dated August 29, 1986, alleging discrimination in employment on the basis of sex.

B E T W E E N :

Ontario Human Rights Commission

- and -

Michelle Crane

Complainant

- and -

McDonnell Douglas Canada Ltd.

- and -

Ken Cooper

Respondents

DECISION

Adjudicator : Professor John D. McCamus

Date : August 6, 1996

Board File No: BI-0012-92

Decision No : 96-024

APPEARANCES

Ontario Human Rights Commission	)))	Kikee Malik Counsel
Michelle Crane	)))	On her own behalf
McDonnell Douglas Ltd.	)))	James Noonan & Louise Tennant Counsel
Ken Cooper	)))	James Noonan & Louise Tennant Counsel

I. Introduction

These proceedings have arisen from a Complaint made by the complainant concerning the termination of her probationary status as an employee of the respondent corporation, McDonnell Douglas Canada Ltd. The complainant had been hired by the respondent corporation on the basis that she would have probationary status for 60 days during which time her performance would be assessed and a decision would be made as to whether to place her on regular status. Shortly before the end of the probationary period, the complainant was advised that she was being dismissed. The personal respondent, Mr. Ken Cooper, was the Foreman responsible for supervising the complainant's work at the time of this decision. The complainant alleges that the decision to dismiss taken by the respondent was based on gender discrimination and, more particularly, that it rested on the bias of Mr. Cooper, who it is alleged, "did not want a woman working in his department". On this basis, it is alleged that the decision to terminate the complainant's employment constituted a contravention of section 4(1) of the *Human Rights Code*, 1981, S.O. c. 53 which reads as follows:

4 - (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or handicap.

Certainly, if the allegations put forward by the complainant were to be established as fact in these proceedings, such conduct would amount to a clear contravention of this provision.

In reply, essentially three points are advanced on behalf of the respondent. First, it is alleged that the complainant was dismissed for reasons which have nothing to do with her gender. More particularly, it is alleged that the decision was based on two considerations. First, it was said to be based on the fact that she had received a very negative reference from her previous employer which had come to the respondent's attention shortly before the end of her probation period. Second, it was

alleged that the decision was based on the fact that the complainant had been observed being away from her workbench too often and for periods of time which were too lengthy.

With respect to the personal respondent, Mr. Cooper, two points were made. First, it is said that Cooper did not make the decision to dismiss. It is alleged that the decision was effectively made by individuals higher up the chain of command and more particularly, that it was made by the Manufacturing Manager, Mr. Bill Delacourt, and Ms. Frances Gallop from the respondent's labour relations department. Finally, and in any event, it is alleged that there is no credible basis for concluding that Mr. Cooper's assessment of the complainant's performance was motivated by gender bias.

In order to decide the present matter, then, it will be necessary to determine whether the reasons advanced by the respondents for dismissing the complainant are genuine or are, rather, a ruse designed to disguise the fact that the complainant was dismissed because of her gender. Further, it is necessary to determine whether the respondent Cooper's involvement in the dismissal, if any, was motivated by gender bias. Before turning to consider these issues in detail, it will be useful to set out a brief account of the evidence led by both parties in this proceeding, and a brief account of the applicable principles of law.

II. Summary of Evidence

In her evidence, the complainant provided an account of the circumstances under which she accepted a position as a Machine Parts Finisher at the respondent corporation. At the time of her application, she was employed at Compact Mould Ltd. She applied to the respondent corporation, was interviewed, and hired to a probationary contract. She began work in department 416 where she

stayed for about a month. She and her co-workers in 416 were then moved to 408, where they came under the supervision of the respondent Cooper.

The work in which the complainant was engaged involved finishing work on large parts for airplanes manufactured by the respondent. The layout of the work space in 408, the nature of the work undertaken, and the respective location of various individuals was described both in the complainant's evidence and in the evidence of others. It is sufficient for present purposes to note that the work space in question was a large open work space where there were as many as 40 or 50 employees engaged in the type of work undertaken by the complainant. About half of them had been transferred from 416 to 408 with the complainant. It was the complainant's perception that her work was going rather well in both 416 and 408. Neither the Foreman nor the Assistant Foreman who supervised her work complained to her about the quality of her work. Neither were there complaints about the issues that surfaced in the context of her dismissal - frequent and too lengthy absences from her workstation - communicated to her by her supervisors. She explained that apart from the usual breaks, the absences from her workstation would be occasioned either by trips to the washroom or trips to the tool crib. It was her view that her absences from the workstation for these purposes were neither frequent nor unusually lengthy. Accordingly she was rather surprised when she was terminated shortly before the expiration of her probationary period. Upon making inquiries with fellow workers she was advised by one that he had heard rumours that her dismissal was related to the fact that she had been going to the washroom too much. Another indicated that he had heard a negative evaluation from a previous employer had caused problems and that "her work wasn't any good". Part of the surprising nature of the dismissal may have resulted from the fact that the complainant was not aware of the nature of the probationary period or the need to successfully pass

through probation in order to gain regular status and the protection of union membership. Further, the complainant was not aware at that time of the nature of her former employer's reference. In her evidence, she provided an explanation for what she viewed as the unfairness of comments made by her previous employer.

Two co-workers, Joe Green and Shirley Mifflin, also testified on the complainant's behalf. Each of them indicated that they thought that the complainant was a good worker and that she was making good progress. Joe Green was the union committee man and it would appear that he took a special interest in the complainant's situation. Having been advised by another worker that the complainant might be in some difficulty with her probation, Green kept track of her production, and encouraged the complainant to do so. Green satisfied himself that her productivity was satisfactory. The records maintained for this purpose were submitted in evidence in this proceeding. It was Green's view that the complainant had not been unduly absent from her workstation and he indicated that he would have drawn this to her attention if he had noticed it.

The second co-worker, Shirley Mifflin, also indicated her view that the complainant was "an excellent worker." It was also her view that the complainant had not been away from her workstation to an unusual degree. Further, it was Ms. Mifflin's evidence that she had had difficulty herself with the respondent Cooper. She described an incident in which one of her co-workers, Eddie Lee, was not fairly sharing the workload. She complained to Cooper and she found that Cooper's intervention was not successful in resolving the problem. Thus it was her view that Cooper had allowed a male worker to get away with not working as conscientiously as a female worker, that is herself. This was, in her view, evidence of a discriminatory attitude on Cooper's part.

The final evidence led on behalf of the complainant was that of Richard Glassco. Glassco was employed as an Assistant Foreman reporting to Cooper. The complainant did not report to Glassco although Glassco did supervise the complainant on one occasion. Although Mr. Glassco had no substantial basis for offering an assessment of the complainant's performance, he did have a view of why it was that she was having difficulty. He testified that he had overheard Cooper instruct Raj Sood, the Assistant Foreman to whom the complainant reported in 408, that he wanted Sood to keep track of the timing of the complainant's absences from her workbench. Glassco offered the opinion that this action on Cooper's part was linked to gender bias held by Cooper. Glassco testified that on a previous occasion Cooper had said that "a woman's place is in the home and on her back". He further testified that these types of comments would be made approximately once a week although he couldn't remember any other actual comments made by Cooper.

On cross-examination, Glassco was questioned about two incidents involving himself and Cooper. On one occasion it was suggested that as a result of his mistreatment of two ethnic employees, Cooper intervened, and, as a result of Glassco's behaviour, ultimately required Glassco to meet with Bob Drennan and Joan Dick. Glassco downplayed the importance of this incident and indicated that he had been allowed to continue to supervise the two employees in question. The second incident relates to a period of time Glassco spent on medical leave shortly before leaving his employment with the respondent corporation. Cooper was suspicious of the medical basis for the leave and subjected Glassco to surveillance by detectives. The detectives discovered that Glassco was indeed involved in setting up his new business and involved in doing some lifting. Glassco was made aware of this situation. Following this episode, Glassco had a conversation with Cooper. Glassco now maintains that he was not angry with Cooper on this occasion. Subsequently Glassco

reapplied for work at the respondent corporation and discovered, through enquiries, that his file had been marked "do not rehire". Glassco testified that he believed that the respondent Cooper was standing in the way of his reappointment. Nonetheless, Glassco testified that he was "not angry" at Cooper as a result.

Evidence was led on behalf of the respondents from the respondent Cooper, from the Manufacturing Manager, Bill Delacourt, from the personnel director, Chuck Conlon, from the responsible labour relations officer, Frances Gallop, and from the head of employee services at the relevant point of time, Bob Drennan.

In his evidence, the respondent Cooper replied to the allegations made by Mifflin and Glassco. He indicated that he was shocked by Mifflin's evidence since he had no idea that she had feelings of this kind concerning him. With respect to the incident concerning Eddie Lee, Cooper had responded to Mifflin's complaint by reshuffling the work assignments in a way which he thought would ameliorate the problem experienced by Mifflin. However, he indicated to Mifflin, that, in the absence of a formal complaint, there was not much more that he could do. The workplace was unionized and, in Cooper's view, a formal complaint was necessary as a first step towards a more rigorous intervention. He had thought that he and Mifflin had enjoyed a very cordial relationship, having a rather friendly environment in their area of the workplace. When Mifflin indicated that she wasn't satisfied with the resolution of the Lee problem, a meeting was held with Bob Drennan and Joan Dick which Cooper attended. Mifflin expressed concern that she was losing time as a result of Lee's performance. Cooper testified that he reassured Mifflin that this would not be a problem. Further, he indicated that when he became aware of medical difficulties Mifflin was experiencing, he tried his best to be accommodating of her situation by making special arrangements of various kinds. In short,

it was Cooper's testimony that he thought his working relationship with Mifflin was completely satisfactory.

With respect to Glassco's testimony, Cooper testified that he had reprimanded Glassco with respect to the incident concerning the two ethnic employees and that he had involved Drennan in the matter. Further, Cooper testified that when Glasco discovered that he had subjected him to surveillance with respect to his absence, Glassco returned to his office and had a very heated exchange with Cooper. Cooper indicated that Glassco was "very angry" and went off to see Delacourt. Cooper testified that it was indeed Delacourt who wrote "do not rehire" on Glassco's file. Cooper denied that he made the sexist remarks attributed to him by Glassco on any occasion.

With respect to the complainant, it was Cooper's evidence that the principal problem with her performance related to her absences from the workbench. In Cooper's view, she was someone who spent excessive time off the job. One would see her walking back and forth as if she were going somewhere without purpose, that is to say, with a view toward wasting time. She would be "ambling along." It was Cooper's evidence that others had noticed this. She had passed by the morning meetings of supervisors and Cooper would be asked "Who is she? Why is she walking back and forth?" Both Delacourt, the Manager, and McCulloch, another employee, according to Cooper, made this point. As well, in his view, even when she was working she would be disruptive. She would stop work when smoking and talk to others, thus disrupting the other workers. In Cooper's view it was acceptable to smoke and to continue working at the same time but not to engage in conversation with others. With respect to Mifflin's observation of the complainant, Cooper suggested that Mifflin was not in a good position to observe her work performance. The nature of Mifflin's work, as a Coiner, would require her to focus on a pressure gauge for much of the time.

Mifflin had offered a very positive assessment of the parts worked on by the complainant. Cooper indicated that it would be very difficult for Mifflin to know which of the parts Mifflin worked on had been prepared in fact by the complainant.

Cooper testified that since about 70% to 80% of his time was spent on the shop floor, he was in a better position to assess the Complainant's performance. Indeed, it was his evidence that he would make a special point of observing probationary employees. Cooper explained that it was his practice not to speak to probationary employees about difficulties that were manifest in their performance. If they improved and succeeded in surviving the probationary period, they were likely to lapse once they acquired regular or permanent status. Once they became permanent, it was very difficult to dismiss employees because of the resistance of their union. It was for this reason that he did not communicate his perceptions concerning absenteeism to the complainant.

Cooper also testified in a general way about the transfer of employees, including the complainant, from 416 to 408. The supervisor in 416, Russ Chappell, was, in Cooper's view, rather "laissez-faire" in his approach. It was Cooper's view that the 416 group was not particularly keen to move over to his area. Cooper viewed himself as a much stricter supervisor, who would "go by the book." The 416 group was prone to participating in "passive resistance", not able to find the appropriate tool, going to the washroom at inopportune moments, etc. Cooper indicated that he liked to run a tight ship and that this had not been the experience of the 416 employees during the supervision of Chappell.

Bill Delacourt, the Manufacturing Manager, provided an account of the organizational structure in the area in which the complainant worked. Raj Sood was the Assistant Foreman to Foreman Cooper who reported in turn to the General Supervisor, Paul Murphy, who reported in turn

to Delacourt. Frances Gallop was the Labour Relations Representative responsible for this area. Delacourt reported in turn to the Vice President in charge of manufacturing, Ken Palfry. Delacourt described the organization of a typical day, beginning with the meeting of the supervisors at the beginning of the day to organize the day's work. It was his view that Cooper was one of the better supervisors, rather firm but fair. Delacourt explained that during the period in question the respondent corporation was in the midst of a program to increase the number of women on the shop floor. This was an initiative of Vice President Palfry. With respect to the complainant, Delacourt indicated that he had observed her walking back and forth in front of his office from time to time. He began to feel concerns about the frequency of these trips and their duration. He mentioned this problem at one of his 8 a.m. staff meetings with the supervisory staff. In particular, he raised it with Cooper. He suggested that he should keep an eye on the complainant. Delacourt was sufficiently concerned that he timed the complainant and discovered that she would be away from her workplace for twenty minutes or so at a time. It was his observation that she was a very slow walker and that she would talk to people along the way. It happened often enough, he testified, that it was noticeable. This phenomenon did not occur during normal breaks, but during working hours. He developed this concern only after the complainant moved to Cooper's area because it was then that the pattern of movement of the former 416 employees would involve walking back and forth in front of his office. Delacourt described a meeting with Frances Gallop and one or two others in which Gallop showed him a very unfavourable reference from the complainant's previous employer. Delacourt replied that we have been watching her "and this clinches it". Delacourt reported that he then spoke to Cooper and Murphy and told them that "we were going to terminate." Delacourt reported that Cooper and Murphy agreed that they had noticed the same phenomenon. Delacourt described Glassco as

someone who had abused the company when he left and spent time on disability and sick leave while he was well enough to be setting up his new business. When Delacourt became aware of this, Delacourt decided that he should not be rehired and made a notation to this effect in Glassco's file.

Frances Gallop also testified with respect to her recollections of the meeting in which the decision was taken to terminate the complainant. Gallop indicated that the respondent corporation was experiencing difficulty with permanent employees who had, in her view, not been adequately assessed during the probationary period. Accordingly, there was a policy in place to insist on more careful reference checks and more vigorous assessments during their probation. When Gallop received what she considered to be an "appalling" reference from the complainant's previous employer, she took the initiative to arrange a meeting with Delacourt. The reference indicated problems with the complainant's attendance and production. The reference also indicated that the previous employer felt it had been misled about the complainant's move to the respondent. Gallop indicated that this misleading conduct was not her principal concern. The other items in the reference indicated that the complainant was, in Gallop's view, just the sort of individual they were trying to avoid hiring. In Gallop's view, it would not have mattered how well the complainant performed during the probationary period. Employees can be wonderful on probation and once permanent they can become a very different person. As far as Gallop was concerned, it wouldn't matter, therefore, what her current supervisors thought of the complainant. It was Gallop's view that, if Delacourt and the others had attempted to support continued employment of the complainant, Gallop would have insisted on taking the decision further up the managerial chain as she felt very strongly that the reference alone provided a basis for termination of the complainant's probationary status.

Chuck Conlan and Bob Drennan testified with respect to the respondent corporation's policies and practices relating to the employment of women on the shop floor. Although historically women were not frequently employed on the shop floor, the respondent had, prior to the appointment of the complainant, consciously decided to take steps to rectify this situation. In summary, it was suggested that under the influence of American executives who were familiar with the phenomenon of affirmative action, the company was attempting to respond to the Abella Report on Employment Equity and various initiatives of the federal government by increasing the number of female employees employed in its workplace through improved methods of recruitment, and so on.

III. Applicable Principles of Law

As the parties were not in substantial disagreement with respect to the applicable principles of law, extensive examination of legal principle and supporting authority is unnecessary here. I will deal briefly with the main propositions advanced on behalf of the complainant. First, it was suggested that the initial burden of proof in a case such as the present falls upon the complainant to establish a *prima facie* case. Once a *prima facie* case has been established, the onus shifts to the employer to provide some nondiscriminatory explanation for the action taken. Finally, on an assessment of all the evidence led, a decision has to be made as to whether or not an explanation of discrimination is a more probable one for what has occurred than the other explanations offered by the respondent.

In a case such as the present where the evidence supporting the allegations of discrimination is circumstantial in nature, there is room for disagreement with respect to the standard of proof required. Under the so-called *Kennedy* standard (drawn from *Kennedy v. Mohawk College, Ont. Bd. of Inquiry*, Borins, 1973), it was suggested that in a case of circumstantial evidence, a Board should

find discrimination only when the evidence is “consistent with the allegation of discrimination and inconsistent with any other rational explanation.” This standard has been criticized as being an unduly difficult one for the complainant to meet in a human rights case. Such criticism has led a number of tribunals and the author of a leading textbook to conclude that the appropriate standard is that “an inference of discrimination may be drawn where the evidence offered in support of it renders such an inference more probable than all the other possible hypotheses or inferences;” *Cook v. A.J.R. Enterprises Ltd.* (1990), 12 C.H.R.R. 319 (B.C.); *Corrigan v. Pacific Western Airlines Ltd.* (1988), 9 C.H.R.R. D/4993(Can.) at D/5001; B. Vizkelety, *Proving Discrimination in Canada* (Toronto: Carswell, 1987) 142.

Although it is my view that nothing turns in the present case on whether the *Kennedy* standard or the “more probable” standard is adopted, I note that Counsel for the respondents did not argue against the proposition that the more probable standard is the appropriate one. In any event, there is, in my view, a risk that the *Kennedy* standard may be applied too strictly and that risk appears to be usefully undermined by a shift to a “more probable” standard.

Secondly, Counsel for the complainant stressed that in order to find that discrimination has occurred, it is not necessary to find that bias or discrimination is the exclusive explanation for the conduct impugned in the particular Complaint. It is sufficient that bias or discrimination is one of the reasons for or causes of the action in question, even though it might not be the preponderant one. This proposition is indeed well established by human rights and other case law. (See, e.g., *R. v. Bushnell Communications Ltd.* (1973), 45 D.L.R. (3d) 218 (Ont. H.C.); *Horton v. Regional Municipality of Niagara* (1988), 9 C.H.R.R. D/461 (Ont.)). In the present case, then, it would be a sufficient basis for imposing liability if any of those involved in making the decision to terminate the

complainant's probationary status were acting on the basis of discriminatory bias as one of the reasons for or causes of the decision to do so.

With respect to the question of the shifting of burden of proof, it is not necessary to offer a conclusion as to whether or not the burden to establish a *prima facie* case was met. The respondents, in any event, sought to lead evidence justifying their conduct and it is sufficient for present purposes to assume that the Complaint will not enjoy success unless, upon an assessment of all the evidence, it appears that discrimination, as a partial reason or cause, is a more probable explanation than other explanations offered by the respondents.

IV. Findings Relating to the Decision to Dismiss

This section of the decision sets out my findings with respect to the question of why the respondent corporation terminated the complainant's probationary employment. In reaching conclusions concerning this matter, I have placed considerable weight on the evidence of Gallop and Delacourt. These were the two individuals responsible for the decision to dismiss. There is no evidence from which one could find the existence of any discriminatory bias in either Gallop or Delacourt. Both appeared to testify in a straightforward manner. The credibility of the evidence of these two critical witnesses has not been successfully undermined or attacked by the complainant.

Further, it is material, in my view, to consider the labour relations context within which this decision was taken. As was emphasized in the testimony of Delacourt and Gallop, there was a risk perceived by the respondent corporation that employees will perform successfully during a period of probationary employment but then deteriorate or revert to bad habits once they have achieved permanent status. The respondent corporation's workplace is unionized and it is the corporation's

view that once an employee achieves permanent status, it becomes extremely difficult to dismiss an employee. Accordingly, it was the respondent's policy, according to Gallop, to attempt to assess probationary employees carefully with a view to determining their suitability at a time when their dismissal was more easily effected. Indeed, it was Gallop's view that the company had not been sufficiently vigorous in pursuing a policy of this kind in the past. This was why she and others were insisting on more careful follow-up on probationary employees in terms of checking references from previous employers.

It is against this background that it is quite understandable, in my view, that Gallop was particularly troubled by the reference provided by the complainant's previous employer, Compact Mould Ltd. It is not necessary to set out that reference in full. I note, however, that the reference form, prepared by the respondent corporation, asked for ratings on a scale of excellent, good, fair and poor under four headings - ability, conduct, production, and attendance. The president of Compact Mould Ltd. rated the complainant as good only with respect to conduct. With respect to ability, the complainant was rated as "poor". With respect to attendance the complainant was rated as "fair" to "poor". With respect to production, the complainant was rated as "fair". The respondent's form then asked for "reason for termination". The form states the following response: "As far as we know she suppose [sic] to come back to work, we're told she need [sic] time off to look after a very sick relative." The form then asks whether the employee is eligible for rehire. The answer given is "no." The form then asks for an explanation of a no answer. The response offered is "we feel she took much time off; & being misled on the motives."

Ms. Gallop's evidence was that she was appalled by this reference and saw it as being, in itself, a basis for terminating the complainant's probationary status. In my view, Ms. Gallop's

evidence has not been undermined and I find that her motivation in seeking the complainant's dismissal rested exclusively on her concern with this reference and her concern to avoid employees who might prove to be difficult once they have attained permanent status.

Mr. Delacourt indicated at the meeting with Gallop that he was initially quite concerned about the complainant's performance, more particularly, her extended absences from the workbench, and that the bad letter of reference therefore, served to confirm what he had already been thinking. It may be asked, then, whether Delacourt's view concerning the complainant's performance was a genuine one or whether it was, in some sense, infected by a discriminatory bias. The only possible basis for impugning Mr. Delacourt's evidence in this regard would be to suggest that since his view is inconsistent with the more favourable assessments of the complainant's performance in this respect offered by Ms. Mifflin and Mr. Green, that the views of Mifflin and Green should be considered accurate and the views of Mr. Delacourt to be not merely inaccurate but the product of discriminatory bias or some other form of malevolence. In my view, the most likely explanation for the difference in opinion between Delacourt on the one hand, and Green and Mifflin on the other, with respect to the presence or absence of a problem relating to extended absences from the workbench is to be found in the different perspectives brought to the subject by a manager as opposed to a co-worker. Putting to one side the question of whether it is possible to determine what the requisite standard of performance in this regard might be, it is not at all surprising that conduct which might be found to be acceptable by fellow employees would not be found to be acceptable by management. Delacourt's evidence on this point was straightforward. He had discovered what he considered to be a problem and had made a point of observing and of timing the complainant's absences on several occasions. This conduct was, in his view, plainly unacceptable. It is possible that Green or Mifflin either did not

notice the phenomenon or did not see it as problematic to the same degree as Delacourt. It was Cooper's evidence, it may be recalled, that employees who had been transferred over from 416 to his area demonstrated a general laxity in such matters. Both Mifflin and Green were transferred from 416 to Cooper's area. In my view, it is not necessary to place weight on a finding of a general tolerance of absences from the workbench in the 416 group in reaching the conclusion that Delacourt had a different view on this point from Green and Mifflin. I find that Delacourt's view was a genuine one which was supported, in his view, by his personal observations of the complainant's conduct. Accordingly, I find that the reasons present to Delacourt's mind when he participated in the decision to terminate the complainant's probationary status were that he was troubled by what he viewed as her excessive absence from the workbench and the bad letter of reference that she received from Compact Mould Ltd.

In summary, then, I am satisfied that the motivations of Gallop and Delacourt in reaching the decision to terminate the complainant's probationary status were unaffected by any discriminatory view or bias. No evidence, either circumstantial or direct, was offered which would support a finding that either Gallop or Delacourt suffered from discriminatory attitudes, nor was the credibility of their evidence undermined in any respect.

In attempting to determine why the complainant's probationary status was discontinued, however, attention must be turned to the potential role of the respondent Cooper. In the original Complaint (Exhibit 2), the complainant states that "I believe that the only reason was that my supervisor, Ken Cooper, did not want a woman working in his department." The underlying assumption of this aspect of the Complaint is that the respondent Cooper made the decision to terminate the complainant's probationary status or played a significant role in the decision to do so.

On the basis of the evidence of Gallop and Cooper, which I accept, it would appear that Cooper played no such role. The evidence indicates that the decision to dismiss was made by Delacourt and Gallop. Neither Gallop nor Delacourt appeared to rely on Cooper for information or advice. It was Gallop's evidence that the bad letter of reference simply settled the matter and she was indifferent to the views of those who were supervising the complainant. If the complainant was performing well during her probationary period, that would not have improved the situation from Gallop's point of view. According to her evidence, if Delacourt had not agreed with the decision to terminate the employee, she would have moved the decision further up the managerial hierarchy. From Delacourt's perspective, it is important to note that Delacourt developed a negative view of the complainant on his own initiative and on the basis of his own observations. Indeed, he instructed Cooper to keep an eye on her. When approached by Gallop with the bad letter of reference, Delacourt indicated that it simply confirmed what he thought already. Delacourt was not directly asked whether he would have paid any attention to Cooper's advice if Cooper had reported that he thought the complainant's performance was acceptable. In the context, however, it seems most unlikely that a favourable comment from Cooper would have saved the situation for the complainant. This is not a case, in my view, where a decision-making process has been infected by information from an allegedly biased source, i.e., Cooper. Rather, it is a case where the effective decision-makers, Delacourt and Gallop, were acting on the basis of their own information and judgment and where the effective decision-makers have not been demonstrated to be suffering from a discriminatory bias.

In summary, it is my conclusion that the reasons underlying the termination of the complainant's probationary status are twofold. First, the effective decision-makers were concerned about the bad reference she had received from a previous employer. Second, they were concerned

about what was perceived by Delacourt to be a pattern of excessive absences from the workstation. I note in passing that the rumours communicated to the complainant by her co-workers concerning the reasons for her termination appear to be accurate in this regard. I have concluded that the effective decision-makers with respect to the termination were Delacourt and Gallop, and that Cooper played no significant role in this decision.

On the basis of these conclusions, therefore, it appears that the Complaint against the respondent corporation and the respondent Cooper can and should be dismissed. I would be remiss, however, if I did not examine further the role of Cooper in the dismissal for two reasons. First, if I have erred in my finding with respect to the locus of the decision-making, the conduct of Cooper could become material and it is therefore appropriate to make findings of fact concerning it. Secondly, this proceeding has been much preoccupied with evidence concerning the conduct of the respondent Cooper and it would no doubt be unsatisfying to the complainant and to the respondents if the allegations made concerning Cooper during these proceedings were not addressed in this decision.

V. Findings Concerning the Personal Respondent

The theory underlying the original Complaint and much of the evidence led in this proceeding is that the respondent Cooper is a man who is biased against women, or at least, against the employment of women in a particular kind of work place for reasons of gender bias, and that this bias infected Cooper's assessment of the conduct of the complainant during her probationary employment. As I have indicated above, it is my view that in the unusual circumstances of this case, the respondent

Cooper did not play an effective role in the decision to terminate the complainant's probationary employment. If I am wrong in this view, however, it would be material to consider whether Cooper's assessment of the complainant's conduct was indeed influenced by discriminatory attitudes.

As a preliminary point, it should be emphasized that the evidence against Cooper on this point is circumstantial in nature. It rests essentially on the following factors. First, Mifflin accused Cooper of discriminatory conduct in her dealings with him. Secondly, Glassco accused Cooper of making sexist remarks. Thirdly, Mifflin and Green believed that Cooper was inaccurate in his assessment of the complainant as someone who spent inordinate periods of time away from the workbench. Further, it is alleged that since Cooper never mentioned this problem to the complainant directly, his concern has the appearance of a pretense or excuse conjured up to provide a disguise for a decision based on discriminatory bias. Emphasis is also placed on the fact that the complainant's productivity was assessed by her co-workers as acceptable. Indeed, it is alleged that her productivity was higher than that of a male probationary co-worker, Bassan, who was not dismissed, thus rendering suspicious the dismissal of the complainant. From these factors, it is argued, it appears more likely than not that Cooper's negative view of the complainant's conduct is to be explained by his discriminatory attitude towards women generally or towards women in his workplace.

In my view, when each of these factors is considered more carefully and when evidence to the contrary is also weighed, it appears more likely than not that Cooper's assessment of the complainant's conduct was the result of Cooper's observation of her performance rather than a product of a discriminatory bias. The fact that he did not mention the problem to the complainant during her probationary period is satisfactorily explained by the industrial relations context in which the incident took place. However unfair it might appear to an outside observer, it is nonetheless quite

credible that the respondent corporation and Cooper did not like to signal problems to a probationary employee so as to inspire satisfactory conduct during the probationary period. As Delacourt, Gallop and Cooper testified, if there were problems, they wanted to observe them fully and take them into account in deciding whether or not to extend the period of employment. Thus, the fact that neither Delacourt nor Cooper signalled their concerns to the complainant so as to enable her to correct her performance is not a basis for inferring discrimination. Far from being a subsequently conjured up pretense for the dismissal of the complainant initiated by the respondent Cooper, it was Delacourt's evidence, which I accept, that it was Delacourt himself who identified the problem of absences from the workbench, noted it to Cooper and asked him to keep an eye on the complainant. Indeed, Delacourt's observations were communicated in at least one of the sessions held with supervisors at the beginning of the day. This would appear to be the explanation for the fact - which Glassco viewed as sinister - that Cooper allegedly asked the Assistant Foreman, Sood, to keep an eye on the complainant as well. Having been instructed by his boss to keep an eye on the complainant, it is not surprising that Cooper passed on a similar instruction to his assistant.

With respect to the conflict between Cooper's assessment of the complainant with respect to absences from the workbench and that of Mifflin and Green, I have already concluded above that I find it unsurprising that fellow employees might take a different view on this matter than managers. Both Delacourt and Cooper characterize themselves as strict supervisors or sticklers. It is unsurprising, in my view, that Delacourt and Cooper would take a more negative view of what they considered to be the complainant's "ambling" to the toolbox and to the washroom, and the time taken by her in accomplishing these tasks than did her fellow employees. I have concluded that Delacourt's negative assessment of the behaviour of the complainant was a genuine one, notwithstanding the fact

that it differs from the views of Mifflin and Green. Similarly, I conclude that similar views on Cooper's part are unsurprising and do not offer convincing evidence of the presence of a discriminatory bias.

The evidence of Ms. Mifflin concerning her dealings with the respondent Cooper were relied upon by the complainant as evidence of the presence of a sexist bias on Cooper's part. It will be recalled that Mifflin complained about the conduct of a co-worker, Eddie Lee. She felt that Cooper did not satisfactorily deal with this complaint and that his failure to do so was discriminatory in nature. It is my view that the evidence does not support the existence of such a bias, however genuinely the perception may be held by Ms. Mifflin. Cooper's evidence, which I accept, and which is not in conflict with the testimony of Mifflin, is that he attempted to engineer a solution to the problem but indicated to Mifflin that in order to take more vigorous action concerning Lee, he would need to have a formal complaint from Mifflin. According to Cooper's testimony, Mifflin was reluctant to complain against a fellow employee and accordingly, matters were left as they stood. No evidence was led from which one could infer that this was an inadequate response to Mifflin's complaint or that it was a response that Cooper would not have given to a male employee in similar circumstances. In short, the incident involving Mifflin and Lee offers no support for the proposition that Cooper treated female and male employees differently.

The evidence of Glassco concerning a sexist remark or remarks allegedly made by Cooper is, however, on the face of it at least, potentially more damaging. If Glassco's evidence is accepted, it would appear that the respondent Cooper made sexist remarks that would be consistent with the existence of a discriminatory attitude that could come into play in making a decision with respect to the appointment of female workers to his department. It is my view, however, that Glassco's

evidence must be treated with some skepticism. Glassco had two serious “run-ins” with Cooper and may well have had a reason to wish to embarrass him. More importantly, it is my view that Glassco’s evidence was untruthful in at least one respect. Glassco testified that he was not angry about either Cooper’s intervention in the incident involving Glassco’s treatment of ethnic co-workers nor was he angry about Cooper’s decision to hire detectives to place him under surveillance when he was on medical leave nor finally with respect to the decision, which he erroneously attributed to Cooper, that Glassco’s file should be marked as not suitable for rehire. It was Cooper’s evidence, which I accept, that Glassco expressed considerable anger when he confronted Cooper with respect to the surveillance issue. In my view, it is more likely than not that Glassco did express anger on that occasion and that his testimony was, in this regard, false and misleading. It appeared that Glassco, in his evidence, wished to avoid the conclusion that he had harboured some animosity toward Cooper, at least on a previous occasion. I conclude, therefore, that Glassco’s evidence lacked credibility on a material point. Thus, I would be reluctant to rely alone on Glassco’s evidence if it provided the exclusive source of circumstantial evidence relating to Cooper led in these proceedings.

With respect to the questions relating to the complainant’s productivity, I have come to the conclusion that productivity was not an issue in the dismissal. The complainant’s position is that she was productive and therefore should not have been dismissed. On the evidence before me, however, it appears that the decision to dismiss was based on other factors. Thus, the fact that the complainant may have been a productive worker does not make the decision to dismiss a suspicious one. Similarly, the alleged lesser productivity of Bassan - the probationary co-worker who was not dismissed - is not helpful to the complainant. It is adequately explained by the respondent’s evidence - which remains unchallenged - that Bassan had a good attitude and was a hard worker.

More importantly, however, when one examines all of the evidence concerning Cooper's assessment of the complainant's alleged excessive absences from her work station, the most likely explanation for it is that it was an opinion honestly obtained on the basis of first-hand observation, triggered by an instruction from his superior, Delacourt, who said that he had observed a problem of this kind and that he wanted Cooper to keep an eye on the complainant in this regard.

The respondent Cooper has professed in his testimony that he is deeply offended by the suggestion that he has acted in a manner motivated by gender bias. His wife was employed at the material time on the shop floor at the respondent corporation, although not in the area supervised by Cooper. He made reference to an occasion in which he had recommended a female candidate for recruitment with the respondent corporation and that the individual was hired. He also referred to his successful relationships with a number of female employees, though as Counsel for the complainant emphasized, these relationships occurred after the incident concerning the complainant. Though it is my view that the existence of discriminatory bias or conduct based on such bias on a particular occasion is not necessarily inconsistent with good behaviour on other occasions, I am nonetheless satisfied that on the balance of probabilities, the respondent Cooper was not acting on the basis of discriminatory bias when he assessed the complainant's conduct with respect to absences from the workbench.

I should add, however, that when one examines the nature of the circumstantial evidence which came to the attention of the complainant and, in due course, of the Commission, it is not at all surprising that the complainant came to the conclusion that she was a victim of discrimination and that the Commission could have concluded that there were serious grounds for suspecting the existence of such a problem. At numerous points in the evidence, witnesses who appeared on behalf

of the respondent indicated that they simply did not understand why there was a problem in this case. Similar protestations were made from time to time by Counsel for the respondents. However genuinely aggrieved the respondents may feel about the proceedings brought against them, it is not at all surprising in my view that the complainant felt that she had been unfairly treated and, moreover, felt that gender bias had played some role in that mistreatment. In the light of all the evidence led at this proceeding, however, I have concluded that such alleged bias does not constitute the probable explanation for or, indeed, play a role in the respondent corporation's decision to terminate the complainant's probationary employment.

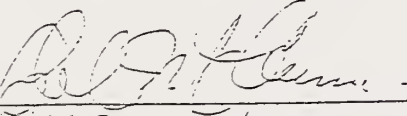
VI. Conclusion

In summary, then, the allegations made in the Complaint are not supported by the evidence led in this proceeding. The complainant alleged that the "only reason" for dismissal "was that my supervisor, Ken Cooper, did not want a woman working in his department." The evidence demonstrates, however, that the decision to dismiss the complainant was not taken by the Foreman, Cooper, but by Mr. Delacourt, the Manufacturing Manager to whom he ultimately reported and Ms. Gallop, from the labour relations department. Their reasons for dismissing her were what was described as an "appalling" reference from a previous employer, and Delacourt's view, which he arrived at from his own independent observations of the complainant, that she took prolonged absences from the workbench too frequently. There is no evidence, circumstantial or otherwise, from which one could find gender bias on the part of either Ms. Gallop or Mr. Delacourt. The evidence of these two critical witnesses was not successfully challenged or undermined by the complainant.

In short, then, by taking aim at Cooper, the Complaint was aimed at the wrong target. Cooper's only connection to the decision to dismiss was that, when apprised of the decision, he indicated that he agreed with Delacourt's assessment of the complainant. It is clear, however, that neither Gallop nor Delacourt were relying on Cooper for information or advice nor would a favourable assessment from him have saved the situation for the complainant. In any event, even if one assumes that Cooper played some role in making the decision - an assumption which would be erroneous in my view - the evidence does not support a finding that Cooper's conduct in agreeing with Delacourt's assessment of the complainant was the product of gender bias.

For the foregoing reasons, then, it is appropriate that this Complaint should be and is hereby dismissed. The parties have agreed that in the event that the Complaint does not enjoy success, I should retain jurisdiction with respect to the matter of costs and I therefore do so. A motion for costs must be brought within 30 days of the release of this decision.

Dated at Toronto this 6th day of August, 1996.



John B. McCamus
Board of Inquiry

